A **DALIAN DRAGON LEADER IMPORT & EXPORT CO LTD**

v.

B **KETUA PENGARAH JABATAN PERLINDUNGAN HIDUPAN LIAR & TAMAN NEGARA & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[WRIT OF SUMMONS NO: 21 NCC-11-2010]
C 11 OCTOBER 2010

CIVIL PROCEDURE: *Mode of commencement - Whether action ought to be commenced under O. 53 Rules of the High Court 1980 ('RHC') - Plaintiff filed writ against defendants for loss of expected profits arising* D *from prohibition of import and export of wildlife species - Change in government policy - Whether case concerned public law issues and involved a direct challenge to a change in government policy and rules in relation to wildlife control - Thrust of plaintiff's claim was an alleged legitimate expectation - Whether remedy sought for was a private or public law* E *issue - Whether non-reliance on O. 53 RHC procedure could constitute an abuse of process of the court - Whether plaintiff should have applied for judicial review*

CIVIL PROCEDURE: *Striking out - Action - Plaintiff's claim concerned matters of public law - Suit filed by way of writ action -* F *Whether action ought to be commenced under O. 53 Rules of the High Court 1980 ('RHC') - Whether non-reliance on O. 53 RHC procedure could constitute an abuse of process of the court - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b) & (d)*

G ***ADMINISTRATIVE LAW:*** *Remedies - Judicial review - Whether action ought to be commenced under O. 53 Rules of the High Court 1980 ('RHC') - Plaintiff filed writ against defendants for loss of expected profits arising from prohibition of import and export of wildlife species - Change in government policy - Whether case concerned public law issues* H *and involved a direct challenge to a change in government policy and rules in relation to wildlife control - Thrust of plaintiff's claim was an alleged legitimate expectation - Whether remedy sought for was a private or public law issue - Whether non-reliance on O. 53 RHC procedure could constitute an abuse of process of the court - Whether plaintiff should have* I *applied for judicial review*

The plaintiff entered into a contract with the 4th defendant to import large quantity of local monkeys (Macaca Fascicularis species) for sale in China. The said monkeys were a protected wildlife species under the Protection of Wild Life Act 1972 ('PWA'). The 4th defendant applied to the 1st defendant for a permit and license to capture and export the said monkeys. Based on the 4th defendant's defence, it was issued a licence to carry on the business of a dealer by, *inter alia*, housing and breeding monkeys under s. 29(b) PWA. There was a prohibition imposed by the Government of Malaysia ('3rd defendant') for the export of monkeys of this species prior to 1 August 2007 and it appeared that the government policy was changed after 1 August 2007 wherein the ban was lifted. Thereafter, it was claimed by the 4th defendant, *inter alia*, that (i) the 1st defendant had represented that it had no objections to the company's proposed primate station and (ii) it was advised to contact the 1st defendant to obtain an export permit for each and every shipment of monkeys. Relying on these representations, the 4th defendant managed to secure a few thousand monkeys for export and thus, entered into an agreement with the plaintiff on the legitimate expectation of a substantial character that the 4th defendant would be allowed to capture and export monkeys. Subsequently, the 1st defendant informed the 4th defendant to halt the capture of monkeys and thereafter, stopped issuing the capture license to the 4th defendant since there was a change of position due to the opposition raised by non-governmental organisations. The 3rd defendant reversed its earlier decision and the Minister for Natural Resources and Environment ('2nd defendant') wrote a letter to the 4th defendant informing it that the Minister decided to disallow the export of monkeys. Hence, the plaintiff commenced this action by way of writ claiming for damages against the defendants for alleged loss, including loss of expected profits. *Vide* a summons in chambers filed in this action, the defendants applied to strike out the suit under O. 18 r. 19(1)(a), (b) and (d) Rules of the High Court 1980 ('RHC') on the combined grounds of absence of a cause of action, the action being embarrassing, frivolous and vexatious and an abuse of the court's process.

Held (allowing defendants' preliminary objection):

(1) This preliminary objection was not merely a technical objection, but it was an objection on jurisdiction. In a proper case, a non-reliance on O. 53 RHC procedure could therefore constitute an abuse of process of the court. Where a suit

raises a public law issue, it will be an abuse of process not to commence an action under the said O. 53 (*Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor*; refd). (para 18)

(2) It was held in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* that a challenge on the use of appropriate procedure is very much fact-based. It is necessary for the judge when deciding on such a matter to first ascertain whether there is a public law element in dispute. If the claim was based solely on substantive principles of public law, the appropriate procedure should be by way of O. 53 RHC. If it is a mixture of public and private law, then the court must ascertain which of the two is predominant. If the claim has substantial public law elements, then the proceeding under O. 53 RHC must be adopted. Failure to do so may result in the process being set aside on the ground that it abuses the court's process. (para 18)

(3) It was not open to a litigant to circumvent the safeguards given to public authorities under O. 53 RHC by resorting to other ordinary process, such as a writ action. The interest of good administration requires expedition in disposing of claims against public authorities and a sieving mechanism to weed out unmeritorious claims by the leave requirement under the said O. 53. (para 18)

(4) This case concerned public law issues and involved a direct challenge to a change in the government policy and rules in relation to wildlife control. Further, the legitimate expectation raised by the plaintiff could not be regarded as a right in private law. The essence of the claim was an abuse of power on the defendants' part in relation to a legitimate expectation and withdrawal of a licence, permits and approvals with regard to the capture and export of monkeys under the law. Hence, the plaintiff should have commenced this action by way of a judicial review application since the public law element was evidently predominant (*O'Reilly v. Mackman*; refd). (paras 9 & 16-18)

[Suit ordered to be struck out for non-compliance with O. 53 RHC.]

Case(s) referred to:
Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821; [2009] 1 LNS 1145 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18, r. 19(1)(a), (b), (d), O. 53
Protection of Wildlife Act 1972, s. 29(b)

For the plaintiff - Rajadevan; M/s Rajadevan & Assocs
For the 1st, 2nd & 3rd defendants - Noor Hisham Ismail, Nadia Hanim Mohd Tajuddin, Haryati Ahmad, Najwa Bistaman & Rohaizan Zainal Jabatan Peguam Negara
For the 4th defendant - V Vijaya Segaran; M/s Maxwell Kenion Cowdy & Jones

Reported by Kumitha Abd Majid

JUDGMENT

Mohamad Ariff Yusof J:

Introduction

[1] The plaintiff, Dalian Dragon Leader Import & Export Co Ltd (Dalian Dragon), is a company incorporated in the People's Republic of China with a registered address in Dalian City. The 4th defendant, Sunny K9 Sdn (Sunny K9), is a Malaysian company with a business address in Ipoh, Perak. Dalian Dragon had entered into a contract with Sunny K9 by which Dalian Dragon contracted to import a large quantity of local monkeys, described as of the Macaca Fascicularis species. The contract was to export and import a total of 30,000 monkeys, which were to be on sold to other parties in China.

[2] Dalian Dragon instituted the suit by way of a writ action against Sunny K9, Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara, Menteri Sumber Asli Dan Alam Sekitar, and the Government of Malaysia. Dalian Dragon claimed for damages against all the defendants for alleged loss, including loss of expected profits, to the tune of USD15,199,000, which at the exchange rate of one USD to RM3.40, came to a total of a hefty RM51,676,600. This was calculated, *inter alia*, on the basis of a profit margin of USD475 per monkey. The full details of the claim appear in the plaintiff's statement of claim at para. 19.

Striking Out Application

[3] The Attorney General's Chambers appeared for the 1st, 2nd and 3rd defendants. By a Summons in chambers filed in this section, these defendants applied to strike out the suit under O. 18, r. 19(1)(a), (b), and (d) of the Rules of the High Court 1980, on the combined grounds of absence of a cause of action, the action being embarrassing, frivolous and vexatious, and an abuse of the court's process.

This Court's Decision In 21 NCC-11-2010

[4] I allowed the application in terms of prayers (1) and (2). In so doing, I indicated to the parties in my brief oral grounds that this case fell squarely within the principles stated in the leading House of Lords decision of *O'Reilly v. Mackman*, as adopted by our local cases, where it is clearly laid down that in a case involving essentially "public law" issues, the proper procedure must be by way of judicial review on the basis of the policy grounds stated in O'Reilly.

Procedural Background (D-21 NCC-11-2010 And D-21 NCC-39-2010

[5] By agreement of the parties, this suit, ie, D-21 NCC-11-2010 was heard together with suit No. D-21 NCC-39-2010. In the latter suit, the 4th defendant, Sunny K9, was plaintiff, with the present 1st and 3rd defendants being the only defendants sued. Subsequent to this court's decision allowing this striking out application, the defendants in suit D-21 NCC-39-2010 raised a preliminary objection on the day set for trial, raising basically the same grounds as stated in this striking out application. I also allowed the preliminary objection and ordered that the second writ of summons and statement of claim be similarly struck out with costs to be taxed.

[6] I have given my detailed written grounds in D-21 NCC-39-2010, wherein I have supplied the authorities in support of my decision. The same reasoning applies in both cases, with one difference, namely on the facts of this present case, there was no direct relationship between the defendants and Dalian Dragon.

[7] For consistency and to avoid unnecessary repetition, I append below the written grounds in D-21 NCC-39-2010 as part of my written grounds for this case as well.

Background Facts

[8] The supporting facts in both cases are in the main the same. So are the parties. It is apparent why there were two cases filed. In the earlier action, Dalian Dragon sued Sunny K9 and the other defendants for damages. In the second suit, Sunny K9 then sued the 1st and 3rd defendants as defendants in consequence. In a way the success of the second suit had to depend on the first. Both, it must be stressed, were commenced by way of writ action instead of an application for judicial review under O. 53 of the Rules of the High Court.

[9] It was plain that both cases concerned primarily and essentially public law issues, and involved a direct challenge to a change in government policy and rules in relation to wildlife control. The thrust of the plaintiff's claim was an alleged "legitimate expectation", but this alone cannot overturn the clear law that such a case must be commenced by a judicial review application as a public law action. This was a case where the "public law" aspect of the dispute was the overwhelming element as compared to the "private law" issues.

[10] As stated above, the facts surrounding this dispute involved the import and export of Macaca Fascicularis, which species is a protected wildlife under Part III, Schedule 2 of the Protection of Wildlife Act 1972 (PWA). This protection also falls under Appendix II to the Convention on International Trade in Endangered Species of Wild Fauna & Flora. There was a prohibition imposed by the Government of Malaysia of the export of monkeys of this species prior to 1 August 2007. This prohibition was enforced in accordance with the policy of the Government of Malaysia, and expressed through relevant orders gazetted as PU(A) 172 and PU(A) 429. It appeared that the government policy was changed after 1 August 2007. It was decided to lift the ban and an amendment was made to the Protection of Wildlife (Import & Export Licences) Order 1979 mentioned earlier.

[11] With the lifting of the ban, Sunny K9 applied to the Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara (1st defendant) for what was described as a CITES permit or, going by its full nomenclature, Convention on International Trade in Endangered Species of Wild Fauna & Flora permit. Sunny K9 also applied for a licence to capture and export that species of monkeys. Going by the Sunny K9's pleaded case, as stated in its statement of defence, it was issued a licence on about 15 August 2007 to carry on the business of a dealer "by housing, confining or breeding, *inter alia*, monkeys under the provisions of s. 29(b) of the PWA". On or about 27 August 2007, Sunny K9 was issued a licence to export the monkeys and a CITES certificate in this connection. Thereafter, according to Sunny K9, the Jabatan Perkhidmatan Haiwan represented to it that the Jabatan had no objections to the company's proposed primate station located at Ulu Piah, Mukim of Ulu Kinta to be made into a primate quarantine Station. Sunny K9 was apparently also advised to contact the Jabatan to obtain an export permit and a single Veterinarian's Single Health Certificate for each and every shipment of monkeys. Relying on these representations, Sunny K9, according to its pleaded averments, managed to "secure" a few thousand monkeys for export. The company also entered into an agreement with its importers (including Dalian Dragon) on the "legitimate expectation of a substantial character that the 4th defendant would be allowed to capture and export monkeys".

[12] Subsequently, however, the Ketua Pengarah Jabatan Perlindungan Hidupan Liar & Taman Negara (the 1st defendant) orally informed Sunny K9 to halt temporarily the capture of the monkeys. The 1st defendant also stopped issuing the capture licence to Sunny K9. Apparently, this change of position arose because there was opposition raised by non-governmental organisations on this issue. The Government of Malaysia and then reversed its earlier decision, and on or about 8 May 2008 the Menteri Sumber Asli & Alam Sekitar (the 2nd defendant) wrote a letter to Sunny K9 informing it that the Minister had decided to disallow the export of monkeys.

Essence Of Complaint By Sunny K9

[13] The position adopted by Sunny K9 is succinctly stated in para. 2.20 of its statement of defence, reading:

> The 1st, 2nd and 3rd Defendants had unreasonably revoked and denied the validity of the said permits and licences and all other approvals and consents relating to the capture and export of the monkeys as at all material times such said permits and licences and approvals and consent were validly obtained and issued by either the express or ostensible authority of the 1st Defendant with the required consent of the 2nd and 3rd Defendants.

[14] As pleaded, the essence of the complaint was an alleged unreasonable revocation and denial of the validity of permits, licences, approvals and consents of these public authorities. This *per se* raises a clear issue of public law involving an unreasonable exercise of governmental power, and as such would fall within the scope of judicial review of administrative action, and not an action for a private law remedy.

[15] The case in favour of the plaintiff in this regard was weaker still, for Dalian Dragon relied on informal representations made to it by the Government of Malaysia that it would allow the export of monkeys from Malaysia to China. Apparently, the representative of Dalian Dragon had come to Malaysia sometime in January 2007 to meet the officers of the 1st defendant, and that at this meeting the Ketua Pengarah at that time had confirmed the Government of Malaysia would allow Sunny K9 to capture the monkeys and export them to China. Paragraph 18 of the statement of claim encapsulates the essence of the plaintiff's claim against the 1st, 2nd and 3rd defendants. According to its pleading, the plaintiff avers that the acts of the 1st defendant and the 3rd defendant in providing confirmation and a representation, as well as active encouragement, to the plaintiff that the plaintiff could import the monkeys from Malaysia had resulted in the plaintiff having a legitimate expectation that it would be able to import the monkeys from Malaysia and as such incurred large expenses in investing for this purpose.

No Contractual Link

[16] There was no contractual link between Dalian Dragon and the Government of Malaysia, nor did the Government of Malaysia or any of its relevant agencies grant any licences, permits, consents or approvals to Dalian Dragon. In short, the claim of Dalian Dragon is as weak or strong as the case made out by Sunny K9. The legitimate expectation raised by Dalian Dragon

cannot be regarded properly as a right in private law. A similar situation was addressed in the case of *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; [2009] 1 LNS 1145, and I agreed with Senior Federal Counsel's citation of the following passage as an apt statement of the applicable principles to be applied:

> The doctrine of legitimate expectation as invoked in all the cases cited by the Appellants show a common trait and that is that the aggrieved parties stand in direct relationship with the decision-makers. In the present case the appellants were not the licence holders and did not have any direct dealing with the Respondent ... the Appellant had no *locus standi* to complain that they had been deprived by the Respondent of the right to be heard and the due process when they were strangers to the arrangement ... and had no contractual relationship with the Respondent ...

[17] Given the evidence and the pleaded case of both the plaintiff, Dalian Dragon, and the 4th defendant, Sunny K9, the reliance on legitimate expectation as a foundation of the claim established clearly that on the facts of this claim, Dalian Dragon should have relied on and resorted to a public law action by way of judicial review, since the public law element was evidently predominant.

Ruling Preliminary Objection In D-21 NCC-39-2010

[18] As earlier stated, I wish to refer and adopt the same detailed reasoning that I applied in D-21 NCC-39-2010. The relevant parts of my grounds of decision are reproduced below:

> This is my ruling on the preliminary objection raised by the Defendants that this action should be struck out for failure to comply with Order 53 and as such constitutes an abuse of the process of the court. Central to this preliminary objection is the effect of the rule in *O'Reilly v Mackman* [1983] 2 AC 237, which has been adopted by our courts in cases such as *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377, *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192, *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413, *Yahya Kassim v. Kerajaan Malaysia & Anor* [1998] 1 CLJ 43, *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor* [2004] 4 CLJ 775 and more recently by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v. Pengarah Kebudayaan Kesenian Johor* [2010] 3 MLJ 145.

This preliminary objection is not merely a technical objection, but is an objection on jurisdiction. In a proper case, a non-reliance on Order 53 procedure can therefore constitute an abuse of process of the court. Where a suit raises a public law issue, it will be an abuse of process not to commence an action under Order 53. The reasoning underpinning this legal position has been aptly described by the Court of Appeal in Dato' Seri Anwar Ibrahim thus:

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a Member of the Administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under Order 53. (At page 398 of the report)

Similarly in *Sivarasa Rasiah*, Gopal Sri Ram JCA (as His Lordship then was) cited with approval passages by Lord Woolf MR in the case of *Trustees of the Dennis Rye Pension Fund and another v. Sheffield City Council* [1997] 4 All ER 747, in particular the passage reading:

> ... if it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review and commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review ...

See also the following passage in *Sivarasa Rasiah* where the Court of Appeal alluded to and approved the principles and guidance given by Lord Diplock in *O'Reilly v. Mackman*, and the following observation on O'Reilly by Lord Woolf in the *Trustees of the Dennis Rye Pension Fund* case:

> What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v Mackman*. This guidance involves recognising: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and of application for judicial review; (b) that judicial review provides, in the interests of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay).

The Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan Kesenian Johor, supra,* has stated that a challenge on the use of appropriate procedure is very much fact-based. It is necessary for the judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim is based solely on substantive principles of public law, the appropriate procedure should be by way of Order 53. If it is a mixture of public and private law, then the court must ascertain which of the two is predominant. If the claim has substantial public law elements, then the proceeding under Order 53 of the RHC must be adopted. Failure to do so may result in the process being set aside on the ground that it abuses the court's process. Conversely, if the matter is under private law, although it might concern a public authority, it would be inappropriate to commence an action under Order 53. The Federal Court added a necessary caveat by saying that the court "should be circumspect in allowing a matter which would be by way of Order 53 of the RHC to proceed in another form" and "to say that it is open to any Applicant seeking judicial review to elect any mode that he prefers ... would, in our considered opinion, be rendering Order 53 of the RHC redundant". The court further noted that the purpose of Order 53 is "the interest of good administration" and that the Order 53 rule must be adhered to except in "limited and exceptional circumstances".

It is not open to a litigant to circumvent the safeguards given to public authorities under Order 53 by resorting to other ordinary process, such as a writ action. The interest of good administration, as mentioned in the cases, requires expedition in disposing of claims against public authorities and a sieving mechanism to weed out unmeritorious claims by the leave requirement under Order 53.

As the parties before this court are very well aware, I had earlier struck out the claim against the first, second, and third Defendants in a writ action No. 21 NCC-11-2010 where Dalian Dragon

Leader Import and Export Co Ltd is the Plaintiff. In that suit, the present Plaintiff remains as a Defendant. I had held in that case that the facts fell squarely within the principle of *O'Reilly v Mackman*, where in a case involving essentially "public law" issues, the proper procedure must be by way of judicial review on the basis of the policy grounds stated in *O'Reilly v Mackman*. On the facts of that case, it was submitted *inter alia* that the Plaintiff could not rely on the doctrine of legitimate expectation because there was no direct relationship between the Plaintiff and the first, second and third Defendants in the case.

The facts in these two cases obviously overlap. After perusing the pleadings of the parties, particularly the Statement of Claim of the Plaintiff, I fail to find any distinguishing features in this present case to set it apart from the other writ action. The key paragraph in the Statement of Claim, namely paragraph 26 encapsulates the necessary elements of this claim and I quote:

> The Plaintiff has suffered detriment, tremendous loss and damages as a result of the actions and non-fulfilment of the assurances, promises and representations made to the Plaintiff by the first, second, third and fourth Defendants and/or its servants and agents, upon which, the Plaintiff had relied upon. The first, second, third and fourth Defendants had acted improperly, by withdrawing the licence to export, licence to carry on the business of dealing with monkeys and the CITES permits and all other approvals concomitant to the capture and export of monkeys. The acts of the Defendants represented an abuse of power and works injustice or unfairness to the Plaintiff without any countervailing benefit for the public.

Based on this pleading, it is clear that the predominant elements in this action are "public law" elements, not private law. This is neither a claim in tort nor contract. Nor is there present any clear and definite connection between the administrative action impugned and a direct interference with vested private property rights, beyond privileges accorded by licences, permits and administrative approvals buttressed no doubt by a claim of legitimate expectation. The essence of the claim is abuse of power on the part of the Defendants in relation to a legitimate expectation and withdrawal of a licence, permits and approvals with regard to the capture and export of monkeys under the law. With respect, this feature of the claim relates to a classic "public law" action.

A For these reasons, I am allowing the preliminary objection of the Defendants. I further order in the circumstances that the action against the Defendants be struck out for non-compliance with the requirements of Order 53 of the Rules of the High Court 1980 and therefore an abuse of the court's process. The Plaintiff should have commenced this action by way of a judicial review application.

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Conclusion

[19] Order that the writ and statement of claim in Suit No. 21 C NCC-11-2010 be struck out with taxed costs accordingly.

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